91-1206

(1)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NO. 91-790

CSX TRANSPORTATION, INC.,
Petitioner,

vs.

Mrs. Lizzie Beatrice EASTERWOOD,
Respondent.

RESPONDENT'S CROSS PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JAMES I. PARKER, ESQ.
TAMBRA PANNELL COLSTON, ESQ.
WILLIAM L. LUNDY, Jr., ESQ.

PARKER & LUNDY
POST OFFICE BOX 1018
CEDARTOWN, GEORGIA 30125
404/748-5643

QUESTIONS PRESENTED

I. WHETHER THE COMMON-LAW RULE WHICH REQUIRES A RAILROAD TO REDUCE ITS SPEED IN A HAZARDOUS AREA IS PREEMPTED BY THE FEDERAL RAILROAD SAFETY ACT WHICH SETS FORTH ONLY MINIMUM SAFETY REQUIREMENTS AND INVITES STATE REGULATION WHERE THERE IS A LOCAL SAFETY HAZARD AND A UNIFORM RULE IS IMPRACTICAL?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NO. **91-790**

CSX TRANSPORTATION, INC.,

Petitioner,

vs.

Mrs. Lizzie Beatrice EASTERWOOD,

Respondent, Cross Petitioner.

RESPONDENT'S CROSS PETITION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Respondent and Cross-Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit Entered June 20th, 1991 on the issue of Federal preemption of the State Common Law requirement that a train travel at a reasonable and prudent speed.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court

United States Court of Appeals

District Court Opinions

State Decisions

Statutes and Constitutional Provisions

Federal Regulations

OPINIONS BELOW

The opinion of the Court of Appeals dated June 20th, 1991 is reported at 933 F.2d 1548 and appears in the appendix of Petitioner's petition for certiorari. The opinion of the District Court dated August 8, 1990, reported at 742 F.Supp 676 is also found in the appendix of Petitioner's petition for certiorari. The Order of the Court of Appeals for the Eleventh Circuit dated August 20, 1991, denying Petitioner's petition for rehearing and suggestion for rehearing en banc appears in the appendix to Petitioner's petition for certiorari.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered June 20, 1991. A petition for rehearing filed by Petitioner herein, was denied on August 20, 1991 and Petitioner filed its Petition for Certiorari on November 15, 1991. Respondent filed this, her cross petition within 30 days of receipt of Petitioner's Petition for Certiorari as provided for in S. Ct. R. 12.3.[1] This Court's jurisdiction is invoked under 28 U.S.C.A. Sec. 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Constitution states in Article VI, Clause 2"

> This Constitution, and the Laws of the United States, which shall be made in Pursuance thereof . . . shall be the supreme law of the Land;

[1] Respondent originally filed this cross petition on December 16, 1991. The cross petition was returned to Respondent for her failure to file this as a seperate document.

Section 101 of the Federal Railroad Safety Act, 45 U.S.C. Sec. 421 provides:

> The Congress declares that the purpose of this Act is to promote safety in all areas of railroad operations and to reduce railroad related accidents, and to reduce deaths and injuries to persons, and to reduce damage to property caused by accidents involving any carrier of hazardous materials.

Section 205 of the Federal Railroad Safety Act, 45 U.S.C. Sec. 434, provides:

> The Congress declares that laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable. A state may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such state requirement. A state may adopt or continue in force an additional or more stringent law, rule, regulation, order or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

Section 213.1 of the Code of Federal Regulations, 49 C.F.R. 213.1 provides:

> This part prescribes initial minimum safety requirements for railroad track that is part of the general railroad system of transportation. The requirements prescribed in this part apply to specific track conditions existing in isolation. Therefore, a combination of track conditions, none of which individually amounts to a deviation from the requirements of this part, may require remedial action to provide for safe operations over that track.

STATEMENT OF THE CASE

A. *Procedural Background*

The underlying case is a wrongful death action for recovery of damages for the death of Thomas Ray Easterwood which occurred on February 24, 1988. The original action was filed by decedent's wife in the United States District Court for the Northern District of Georgia on June 3, 1988. The District Court's jurisdiction was invoked under diversity of citizenship.

The case was set for trial for December 30, 1989. On December 19th Petitioner, CSX, filed its motion for summary judgment contending for the first time that plaintiff's claims were preempted by the Federal Railroad Safety Act of 1970. The District Court granted CSX's motion for summary judgment on August 8, 1990 on the issues of preemption and further found that there were no material issues of fact to be determined by a jury on Plaintiff's non-preempted claims.

Mrs. Easterwood filed her Notice of Appeal to the 11th Circuit Court of Appeals on September 6, 1990. On June 20, 1991 the Court of Appeals upheld the District Court's order finding that the question of whether the defendent failed to travel at a safe and prudent speed was preempted by the Federal Railroad Safety Act and reversed the District Court on all other issues. The 11th Circuit correctly held that Mrs. Easterwood's claim that the Railroad failed to maintain a safe crossing was not preempted by the Federal Railroad Safety Act and there are numerous material issues of fact remaining which are not preempted.

Petitioner, CSX, filed its motion for rehearing and suggestion for rehearing en banc which was denied by the 11th Circuit on August 20, 1991. CSX then filed its Petition for Certiorari to this Honorable Court on November 15, 1991.

B. *Factual Background*

On the morning of February 24, 1988, Mr. Thomas Easterwood arrived at his job of nineteen years at Duncan Wholesale in Cartersville, Georgia, where he worked as a delivery truck driver. He loaded his long bed International truck with various products and left for his first delivery.

February 24th was a cold, clear winter morning when at 8:52 a.m. Mr. Easterwood came upon the Cook Street Railroad Crossing. He was driving slowly and carefully east toward the crossing at a speed of about 10 miles per hour, with the morning sun shining on his windshield. A CSX engine was running backward pulling one car along the railroad track at this same time. The train approached the Cook Street crossing at a speed of between 32 and 50 miles per hour.

Mr. Easterwood attempted to negotiate this dangerous crossing in his long bed truck apparently unaware of the oncoming train. The flashing lights and bells activated just a moment before Mr. Easterwood passed under them and he was killed by the Petitioner's train.

This railroad crossing has been the scene of at least seven prior collisions since 1981. There are numerous problems with this crossing such as a curve in the tracks just north of Cook Street which allows only 150 feet of sight distance for a motorist looking up the track. Problems exist also because of the amount of vegetation allowed to grow along the side of the track, frequently malfunctioning signals which produce false warnings, and a hump in the crossing which make the tracks difficult for drivers of large trucks to maneuver. This is a heavily traveled crossing, as it lies very close to the heart of Cartersville, Georgia, and the tracks run parallel to one of the City's busiest streets. Due to the numerous hazards at this crossing and the large number of motorists who traverse the crossing, cross-petitioner charges the railroad with negligence also, in failing to reduce its speed to a speed which is reasonable and prudent under the circumstances.

REASONS TO GRANT CROSS-PETITIONER'S WRIT

I. THE DECISION OF THE ELEVENTH CIRCUIT THAT CROSS-PETITIONER'S COMMON LAW CLAIM FOR THE RAILROAD'S FAILURE TO TRAVEL AT A REASONABLE AND SAFE SPEED IS PREEMPTED UNDER THE FEDERAL RAILROAD SAFETY ACT IS IN CONFLICT WITH FEDERAL LAW, DECISIONS OF THIS COURT, AND DECISIONS OF LOWER COURTS.

The Eleventh Circuit Court of Appeals decided in the present case that because the Secretary of Transportation had established regulations governing the **maximum** speed for various classes of track, any state common-law claim for failure of a train to reduce its speed is expressly preempted. Courts have noted that the Secretary of Transportation, by enacting speed limits for certain classes of track is addressing the question how fast a train can travel and not derail *Sisk v. National Railroad Passenger Corp.*, 647 F.Supp 861 (Kan. 1986), not what is reasonable and prudent under the circumstances. The Eleventh Circuit held that it is immaterial to the preemption analysis whether the State's objectives are similar to or different from congress's objectives citing *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 83 S. Ct. 1210, 10 L.Ed 248 (1963).

A. *The Eleventh Circuit failed to apply the Principals set forth by this court to determine whether a State law is preempted by Federal law.*

Florida Lime held that the test of whether a state standard must give way to a federal regulation is "whether both regulations can be enforced without impairing the federal superintendence of the field" id. at 142. In the *Florida Lime* case, a California statute gauged the maturity of avocados by oil content by requiring no less than 8 percent oil in any avocado for sale in California. A federal marketing order gauged the maturity of an avocado by a standard which had nothing to do with oil content. The avocado growers challenged the statute under federal preemption. This Court noted that the statutes were different but held that there must be an actual conflict before the state law will be preempted.

The test set forth by this court in *Florida Lime* is whether compliance with both laws would be physically impossible. This Court also gave an example of preemption. The Court noted that there would be an actual conflict if the Federal order forbade the picking of an avocado of more than 7% oil and the California Statute excluded from state sale any avocado with less than 8% oil content.

In the present case, the Secretary of Transportation has adopted a rule which allows a train to travel no more than 60 miles per hour on a class four track. The State common-law requires that a train reduce its speed when a reasonable man would do so. There is no conflict between these two standards. The railroad companies can easily comply with both the federal and the state standard. If the State were to require the Railroad to travel no slower than 70 miles per hour through its borders and Federal law set a maximum speed of 60, the Railroad could not comply with both, and the State law would be preempted. These two requirements are not incompatible *Florida East Coast Railway v. Griffin*, 566 So 2d. 1321 (Fla App. 1990), *Sisk v. National Railroad Passenger Corp.*, 647 F.Supp 861 (Kan 1986), *Carson v. Burlington Northern Railroad*, No. 89-0-513 (D.C. Neb. 7/5/90 unpublished). The above cases noted the speed limits set by the Secretary to be maximum limits only, not necessarily a speed that is safe id. There is nothing in the Federal law which requires a train to travel 60 miles per hour on a class 4 track.

As in the case of gate arms, if the F.R.S.A. has as its stated purpose to promote safety and reduce railroad related accidents then "Certainly it was not the intent of the act to insulate the railroad from liability for specific tortious acts in the face of hazardous conditions" *Florida East Coast Railway v. Griffin*, 566 So 2d. 1321 (Fla App. 1990). To disallow a common-law claim for a train's failure to reduce its speed would be issuing a license to the railroad to kill as many people as they please with no fear of liability. This Court held in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct 615, 78 L.Ed. 2d 443 (1984) that Congress assumed that traditional principals of State tort law would apply with full force unless they were expressly supplanted.

B. *Congress realized that the State's have an interest in the protection of its citizens and contemplated state-regulation of the Railroad in certain areas.*

These traditional principals of state tort-law were not supplanted by Federal Regulations. In fact Congress realized the impractical applications of a national standard and included language urging uniformity only "to the extent practicable". Congress then went further to allow state regulation where there is a "Local Safety Hazard". The language used in the Federal Railroad Safety Act clearly shows that Congress contemplated State regulation.

> Congress declares that laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable. A state may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such state requirement. A state may adopt or continue in force an additional or more stringent law, rule, regulation, order or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce. *Federal Railroad Safety Act*, 45 U.S.C. Sec. 434 (emphasis added)

By this language, it is obvious that Congress realized that the Secretary of Transportation could not know what a safe and reasonable speed is at the Cook Street Railroad Crossing in Cartersville, Georgia. Not only did Congress realize this, but so did the Secretary of Transportation. In the section of the Code of Federal Regulations where the Secretary deals with speed, he added:

> This part prescribes initial minimum safety requirements for railroad track that is part of the general railroad system of transportation. The requirements prescribed in this part apply to specific track conditions existing in isolation. Therefore,

a combination of track conditions, none of which individually amounts to a deviation from the requirements of this part, may require remedial action to provide for safe operations over that track. 49 C.F.R. 213.1 (emphasis added)

This Court has set forth tests to determine whether a scheme of regulations preempt the State law which are similar to the requirements contained in the Local Safety Hazard exception in the F.R.S.A. cited above. First, the State law cannot be incompatible with the Federal Rule. This Court has defined a "conflict" between two laws as "when it is impossible to comply with both State and Federal Law" *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S. Ct. 615, 78 L.Ed.2d 443 (1984), *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 83 S.Ct 1210, 10 L.Ed. 248 (1963). It has already been demonstrated that the State Common-law is not incompatible by the tests set forth by this Court as the Railroad would have no problem complying with both laws.

Second, there must be no undue burden on interstate commerce. The Eleventh Circuit failed to address the local safety hazard exception and so never reached the question of whether the common-law rule requiring a train to reduce its speed in a hazardous area creates an undue burden on interstate commerce.

This Court has found that State laws which affect the train itself and require the Railroad Company to stop at the State line and change equipment are preempted *Southern Pacific Co. V. Arizona*, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945). Cross-Petitioner recognizes that Federal Law preempts virtually all regulations which affect the physical aspects of the train itself.

A common-law rule requiring the Railroad to reduce its speed in a hazardous area does not affect the train itself. It does not require the train to stop at the State line and change equipment. It merely requires a train to reduce its speed in a hazardous area. We ask of the Railroad no more than we ask of a truck driver traveling our roadways and this is no more a burden on the railroad than it is the truck driving industry.

Because the Eleventh Circuit ignored the "local safety hazard" exception, found express preemption of the common-law and failed to apply the principals and holdings of this Court, Cross-Petitioner respectfully requests the Petition for Certiorari be granted on the question of Federal preemption of the common-law speed requirement.

C. *The decision of the Eleventh Circuit Court of Appeals conflicts with the decisions of other courts that have passed on the question.*

Several lower courts have faced the question of whether the Federal Railroad Safety Act preempts claims against a railroad for failure to reduce its speed. Most of the courts however, have been asked to decide whether a municipal ordinance can be enforced against a railroad. These courts have been careful to not address the common-law. In *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir. 1973) the court held that the actions of the parish officials were preempted by the Federal Railroad Safety Act because the acts were not passed at a state level. In the *Donelon* case however the Louisiana parish officials were seeking to regulate the road bed and the tracks themselves. The 5th Circuit did not address the question of speed.

Sisk v. National Railroad Passenger Corp., 647 F.Supp. 861 (D.Kan. 1986) addressed a municipal ordinance which sought to regulate the speed of trains passing through a city. The court in *Sisk* held the municipal ordinance preempted by the F.R.S.A. but also stated that a speed regulation would not be preempted if passed at a state level. The same holding was applied in *CSX Transportation Inc. v. City of Tullahoma*, 705 F.Supp. 385 (E.D. Tenn. 1988), *Consolidated Rail Corp. v. Smith*, 664 F.Supp. 1228 (N.D. Ind. 1987), *City of Covington v. Chesapeake & Ohio Railway Co.*, 708 F.Supp. 806 (E.D. Ky. 1989), *Southern Pacific Transportation Co. v. Town of Baldwin*, 685 F.Supp. 601 (W.D. La. 1987), *Chesapeake & Ohio Railway Co. v. City of Bridgeman*, 669 F.Supp. 823 (W.D. Mich. 1987). None of these courts were asked to address preemption of the State's common-law. All, however, through dicta indicated that the result would be different if the speed ordinances were passed at the State level.

Two cases which have reached the question of whether the common-law is preempted have held that it is not. In *Florida East Coast Railway v. Griffin*, 566 So 2d 1321 (Fla. App. 1990) the Florida Court of Appeals held:

> We reject the appellant's contention that the Federal Act has preempted consideration of negligent conduct of a railroad and its agents when faced with a dangerous condition or event, notwithstanding that the acts of negligence involve a failure to reduce speed below the maximum limit established by federal law.

When the District Court of Nebraska was faced with the question the court could find "no reason why the defendant should not be subjected to common-law liability for operating its train at an excessive speed taking into considerations then existing conditions" *Carson v. Burlington Northern Railroad Co.*, CV No. 89-0-513 (D.C. Neb. 7/5/90) (unpublished). It appears that these two courts applied the longstanding principal that compliance with a legislative enactment will not preclude liability where a reasonable man would take additional precautions *Karl v. Burlington Northern Railroad Co.*, 880 F.2d 68 (8th Cir. 1989), a principal that the Eleventh Circuit failed to apply in the present case.

CONCLUSION

For the above and foregoing reasons, Respondent and Cross-Petitioner respectfully requests the Court to grant the Writ of Certiorari to consider and resolve these important Federal and Constitutional question of preemption of the state common-law speed requirement.

January 24, 1992

Respectfully Submitted,

James I. Parker, Esq.
Counsel of Record

Tambra Pannell Colston, Esq.

William L. Lundy, Jr., Esq.
PARKER AND LUNDY
Post Office Box 1018
Cedartown, Georgia 30125
404/748-5643

CERTIFICATE OF SERVICE

I, James I. Parker, Counsel for Respondent, Cross Petitioner, herein and a Member of the Bar of the Supreme Court of the United States, hereby Certify that I have on this date served three true and correct copies of the foregoing Cross Petition for Certiorari on Counsel for Petitioner by placing same in the United States Mail with sufficient postage affixed thereto and addressed to the following:

Mr. Jack Senterfitt
Mr. Richard T. Fulton
Alston & Bird
1201 West Peachtree Street, N.W.
Atlanta, Georgia 30309-3424

I further certify that all parties required to be served, have been served.

January 24, 1992

James I. Parker
Counsel for Respondent